

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DEWAYNE HERRON,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 229089

Van Buren Circuit Court

LC No. 00-011731-FC

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a),¹ and was sentenced to two to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he is entitled to a new trial because the trial court erroneously submitted two first-degree criminal sexual conduct charges to the jury despite the absence of proofs to support the charge alleging penile penetration. Defendant contends that this oversight resulted in a compromise verdict. However, we note that this issue is forfeited because defendant failed to raise it below. Nevertheless, defendant may avoid forfeiture by demonstrating a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Here, the victim's testimony was sufficient to support the submission of both first-degree criminal sexual conduct charges, inasmuch as her testimony alleged that both penile-vaginal and digital-vaginal penetrations took place. Moreover, our Supreme Court has opined as follows: "We are persuaded by the view that a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). MCL 750.520c(1)(a) provides that an individual is guilty of second-degree criminal sexual conduct where he or she engages in "sexual contact," as compared to "sexual penetration" for first-degree criminal sexual conduct, with a person "under 13 years of age." The

¹ Defendant was acquitted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a).

victim's testimony was plainly sufficient to support submitting the second-degree criminal sexual conduct charge to the jury.² Accordingly, defendant has failed to establish that any error occurred, as necessary to avoid forfeiture. *Carines, supra* at 763-764.

Defendant next argues that he is entitled to a new trial because the trial court failed to instruct the jurors that they must reach unanimity on a specific act. Specifically, defendant suggests that some jurors may have found that he “press[ed] his penis” against the victim, whereas other jurors may have found that he merely touched the victim's breasts. Defendant contends that, if so, the jury's verdict would not have been unanimous as to any specific act. Again, defendant's failure to raise this issue below limits our review to whether he may avoid forfeiture under the “plain error” rule. *Carines, supra* at 763-764.

In *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994), our Supreme Court was faced with a similar issue, and opined as follows:

[I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt.

The *Cooks* Court found that the general unanimity instruction was sufficient in the case before it because “the multiple acts alleged by the prosecutor were tantamount to a continuous course of conduct,” and “the defendant here did not present a separate defense or offer materially distinct evidence of impeachment regarding any particular act. He merely denied the existence of any inappropriate behavior.” *Id.* at 528.

In the instant matter, the gravamen of defendant's testimony, as supplemented by defense counsel's arguments, was that the victim was fabricating all of the allegations and that defendant was completely innocent. In fact, defendant denied even getting into bed with the victim. In

² We note that defendant's brief could be read to challenge the sufficiency of the evidence supporting his conviction of second-degree criminal sexual conduct. A challenge to the sufficiency of the evidence requires us to determine “whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). MCL 750.520a(1) defines “sexual contact” in pertinent part as “the intentional touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification” The victim testified that defendant rubbed her breasts and vagina with his fingers, and that he, at the very least, attempted to penetrate her vagina with his penis. She also testified that defendant's penis felt “really hard.” Viewing this evidence in a light most favorable to the prosecution, the jury could have reasonably found that defendant intentionally touched the victim's “private parts” for the purpose of “sexual arousal or gratification.” Accordingly, we reject defendant's challenge to the sufficiency of the evidence supporting his conviction.

contrast, the victim's testimony suggested that defendant engaged in several acts that were statutorily prohibited. While the jury may not have been convinced that the victim's testimony established penetration beyond a reasonable doubt, the only defense to the sexual contact alleged by the victim was defendant's general denial of any guilt. In other words, if the jury believed defendant and disbelieved the victim, there would be no basis for **any** finding of guilt. Put another way, it is highly unlikely that the jury believed defendant's contention of complete innocence regarding one act of sexual contact, but disbelieved his complete denial as it applied to a separate act of sexual contact. We do not believe, therefore, that the jury was faced with materially distinct proofs regarding the allegations pertaining to second-degree criminal sexual conduct. Moreover, the victim's testimony alleged a "continuous" course of contact, in that the several alleged acts took place within a short period of time, rather than distinct acts occurring on separate occasions. Accordingly, we are not persuaded that the general unanimity instruction provided was plainly erroneous in light of the *Cooks* decision.³ Consequently, in the absence of plain error, we conclude that defendant may not avoid forfeiture of this issue. *Carines, supra* at 763-764.

Next, defendant contends that the prosecutor made improper remarks that entitle defendant to a new trial. We ordinarily review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, defendant failed to object to any of the remarks he now challenges on appeal. Where "a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id.*; see *Carines, supra* at 763-764.

Defendant contends that the prosecutor improperly argued that defendant was guilty by implication based because he fled the scene of the crime. However, even though evidence of flight is insufficient to alone sustain a conviction, it is admissible because it may indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Accordingly, no error resulted from the prosecutor's reference to defendant's flight. See *supra* n 2.

Defendant also contends that the prosecutor "kept mentioning the fact that the Defendant was married when he was seeing the alleged victim's mother," which improperly focused on an irrelevant moral issue. We review prosecutorial remarks in context, and "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354

³ In *People v Gadomski*, 232 Mich App 24, 30-31; 592 NW2d 75 (1998), we opined that "Michigan criminal juries are not required to unanimously agree upon every fact supporting a guilty verdict." The defendant in *Gadomski* contended that "the trial court should have instructed the jury that it was required to unanimously agree on the existence of at least one of the three aggravating circumstances alleged by the prosecution." *Id.* at 29. We rejected the defendant's contention, ruling that the "defendant would have been properly convicted of CSC I even if some of jurors believed that he committed the offense solely on the basis of one aggravating circumstance, while the rest of the jurors believed that he committed the offense solely on the basis of another one of the aggravating circumstances." *Id.* at 31. This ruling provides further support for our conclusion in the instant matter.

(1996). Here, the prosecutor did inquire into the extent of defendant's relationship with the victim's mother. However, the prosecutor's inquiry was directed towards rebutting defendant's theory that the victim's mother, as defendant's jilted lover, persuaded the victim to contrive the allegations against defendant. Accordingly, we find no plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Finally, defendant challenges the credibility of the victim's testimony and argues that, because the victim's testimony was not believable, he is entitled to a new trial. However, it is well established that we may not attempt to resolve credibility questions anew. *Gadomski, supra* at 28. Consequently, we find no merit to defendant's claim.⁴

Affirmed.

/s/ Donald S. Owens

/s/ Jane E. Markey

/s/ Christopher M. Murray

⁴ Defendant notes that even if no single error is sufficient to require reversal, the cumulative effective of all the trial errors "sometimes [makes reversal] necessary." Where, as here, no actual errors are found, a cumulative effect of errors is incapable of being found. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).